

IN THE DISTRICT COURT OF THE UNITED STATES
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: MI WINDOWS AND)
DOORS, INC. PRODUCTS)
LIABILITY LITIGATION) 2:12-MN-00001
)
MI WINDOWS AND DOORS, INC.) Charleston,
) South Carolina
) July 12, 2012

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE DAVID C. NORTON,
UNITED STATES DISTRICT JUDGE

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Proceedings recorded by mechanical shorthand,
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1 THE COURT: I will sign anything the lawyers agree
2 to except for a check.

3 So who wants to go first? Mr. Lucey?

4 MR. LUCEY: Yes, Your Honor, and we did submit an
5 agenda to the Court about a month ago as the Court had set
6 forth in one of its orders.

7 THE COURT: Okay.

8 MR. LUCEY: But perhaps our agenda missed one of
9 the more important items, Your Honor, which would be simply
10 an introduction of the attorneys involved on the plaintiffs'
11 side. So I would like to introduce first Dan Bryson sitting
12 next to me. Mr. Bryson is from North Carolina. I'll ask him
13 to introduce himself in a second in more detail. And to
14 introduce the rest of the plaintiff's counsel.

15 THE COURT: Okay.

16 MR. LUCEY: And the reason I introduced Mr. Bryson
17 first is that the homeowners plaintiffs group has nominated
18 Mr. Bryson to be our lead counsel.

19 THE COURT: Okay. Welcome, Mr. Bryson.

20 MR. BRYSON: Thank you, Your Honor.

21 The only thing I would like to state, at least for
22 the Court's consideration, for my consideration of counsel on
23 the homeowners group, I have been involved in
24 construction-related litigation for about 24 years. I have
25 been involved in numerous defective construction product

1 cases through the years, starting with synthetic stucco and
2 many others. Many of the attorneys on the defendants' side,
3 we've crossed paths through the years and are well
4 acquainted.

5 Most recently, I have been involved with before the
6 Honorable Judge Fallon down in New Orleans on that plaintiff
7 committee for Chinese Drywall, and was the chair of the
8 Science and Expert Committee, and was very involved with
9 that, the plaintiffs' steering committee. I take my
10 involvement to a case very seriously and am very committed to
11 this case and would be honored if the Court enters the order
12 as recommended by the plaintiffs homeowners.

13 The defendants have also seen our proposed CMO's,
14 and to my understanding have no objection, as well both
15 Mr. Hahn with his group and within MI Windows. We have
16 counsel here from various other states that have also filed
17 their claims. And if the Court would like, they can each
18 introduce themselves to the Court.

19 THE COURT: Sure. That's fine.

20 MR. ARSENAULT: Good afternoon, Your Honor, Richard
21 Arsenault, I practice in Louisiana, I have been practicing
22 for about 30 years, been involved in about 25 MDL's and look
23 forward to being involved in this one.

24 THE COURT: You beat Mr. Becnel up here.

25 MR. ARSENAULT: I'm aware of Mr. Becnel.

1 MR. CHAIKIN: Good afternoon, Your Honor. Jordan
2 Chaikin from Parker Waichman in Florida. I am also involved
3 in this case and several other construction defect cases, and
4 I'm certainly happy to be here.

5 THE COURT: Welcome.

6 MR. GEORGE: Good afternoon, Your Honor. Scott Alan
7 George from Seeger Weiss. I work out of Philadelphia, and I
8 work with Mr. Bryson in the drywall case and the case against
9 Pella Windows.

10 THE COURT: Okay. Yes, ma'am?

11 MS. OLIVER: Good afternoon, Your Honor. May it
12 please the Court, my name is Alyson Oliver from Michigan. I
13 represent Plaintiff Deem in this case. I'm involved in
14 MDL's, have been probably for about the past five years. I
15 have been practicing for about 15 years before I switched
16 over to this area of practice, but I'm pleased to be here.

17 THE COURT: Welcome.

18 MR. PECA: Good afternoon, Your Honor. John Peca
19 from Cleveland, Ohio. We have the plaintiffs in the Central
20 District of Ohio. I have been practicing for 32 years. I'm
21 also a certified public accountant, but I don't do that
22 anymore, mass tort and class action litigation for some
23 years.

24 THE COURT: Great. Yes, sir?

25 MR. SHAH: Good afternoon, Your Honor. James Shah

1 from Philadelphia. My firm represents the Pennsylvania
2 plaintiffs and the Wisconsin plaintiffs. I have been
3 involved in a number of MDL's throughout the country over the
4 years, and including with a lot of the members of plaintiffs'
5 counsel, and very happy to be here. Thank you.

6 THE COURT: Thank you. Yes?

7 MS. TODD: Good afternoon, Your Honor. Harper Todd
8 with Justin Lucey's office.

9 MS. FINKELMAN BENNETT: Good afternoon, Your Honor.
10 Natalie Finkelman Bennett from Philadelphia. I have been
11 involved in the MDL litigation for about 20 years, and
12 looking forward to working with you.

13 THE COURT: Look forward to working with you.

14 Yes, sir?

15 MR. GUPTA: Good afternoon. I'm Srivatsa Gupta, I'm
16 from Louisiana.

17 MR. LUCEY: Just to organize where we are with the
18 cases and then we'll turn -- you just heard from not only the
19 transfer of cases but two of the conditionally transferred
20 cases. So the cases before the Court this morning, including
21 the -- this afternoon -- including the condition of transfer
22 cases total eight, the five originally transferred and the
23 three conditionally transferred. And the only case that does
24 not have its attorney here today is the Kennedy case in
25 Illinois. Something came up at the last minute, Mr. Usher

1 couldn't make it, but we are here with his full authority,
2 and with that said, he's in trial.

3 THE COURT: Okay.

4 MR. LUCEY: And we are aware of an action being
5 filed in Kansas. But other than the contractor action, we
6 are unaware of any other actions having been filed, Your
7 Honor.

8 With that, I would turn the floor over to the next
9 party for their introductions.

10 THE COURT: Okay. Mr. Farrier?

11 MR. FARRIER: Richard Farrier here for MI windows.
12 I'll let the rest introduce themselves, and note that it is
13 not correct that we have no objection to CMO 1. We do have
14 one objection; we can handle that later. We certainly don't
15 object to Dan being lead counsel.

16 THE COURT: Okay.

17 MS. LUMPKIN: Good afternoon, Your Honor. Carol
18 Lumpkin with K&L Gates.

19 MR. OUZTS: Good afternoon, Your Honor, I'm Steve
20 Ouzts with Turner Padget.

21 THE COURT: Yes, sir?

22 MR. PERRONE: Good afternoon, Your Honor. Patrick
23 Perrone. I'm also with K&L Gates.

24 THE COURT: Okay.

25 MR. SHIPLEY: Your Honor, I'm Curtis Shipley with

1 Ellis & Winters up in North Carolina.

2 MR. REILAND: Good afternoon, Your Honor. My name
3 is James Reiland and I'm with K&L Gates.

4 THE COURT: Locally or nationally?

5 MR. REILAND: Locally.

6 MR. GARY: Good afternoon. My name is Paul Gary,
7 Gary Law Group, lawyer for MI Windows and Doors.

8 THE COURT: Okay.

9 MR. FREEZE: Good afternoon, Your Honor. Steve
10 Freeze. I'm handling the Ohio case for MI windows.

11 Good afternoon, Your Honor. Annie Zaffuto with K&L
12 Gates.

13 THE COURT: Anybody else?

14 MR. KENNADY: Tom Kennady, Turner Padget.

15 THE COURT: Okay. Thank you. Anybody else? Okay.
16 Mr. Hahn?

17 MR. HAHN: Yes. Pleasure to be in your court
18 again. Blair Hahn. I do want to say the last time I was in
19 your courtroom, I introduced Katie McElveen as Katie Hug (ph)
20 and she told me that she had been married for five years, and
21 it's about time I figured that out. Thank you for having us.

22 THE COURT: Yes.

23 MS. MCELVEEN: Good afternoon, Your Honor. Katie
24 McElveen. I have the pleasure of working with Blair Hahn.
25 Happy to be here.

1 MR. MARCUM: Good afternoon, Your Honor. Christiaan
2 Marcum. I have the same pleasure.

3 THE COURT: All right. These are my interns. After
4 this, they may not go to law school, they may drop out.

5 All right. The first thing, the lead counsel,
6 liaison counsel and plaintiffs steering committee, there is
7 no objection I don't believe right now. Is that right?

8 MR. FARRIER: We don't have any objection to the
9 composition of the steering committee. We object to having
10 dual steering committees, and our concern is they are going
11 to be competing steering committees.

12 THE COURT: Okay.

13 MR. HAHN: Judge, we don't care. I spoke to Mr.
14 Lucey about this, and Mr. Bryson, they have suggested that
15 they may ultimately end up suing some of the contractors,
16 which would create a conflict, which is the reason we set up
17 two separate steering committees, so that if a conflict
18 arises in the future that we are okay.

19 THE COURT: That was my -- you know, in looking at
20 this, Mr. Farrier, if Mr. Ouzts third-partied in the
21 contractors as opposed to being a codefendant, isn't there a
22 potential conflict between Mr. Hahn's clients and
23 Mr. Bryson's clients?

24 MR. FARRIER: Um, there is both. The Court will
25 ultimately have to resolve that disposition. They are either

1 aligned or very adverse.

2 THE COURT: Well, I mean, isn't part of your
3 client's defense is we make perfect windows, they just screw
4 them up when they put them in?

5 MR. FARRIER: You've got it.

6 THE COURT: What's your position about two steering
7 committees.

8 MR. BRYSON: We think there should be two different
9 steering committees, a contractor and a homeowner steering
10 committee. And for Your Honor's considering, Judge Fallon in
11 Chinese Drywall set up a contractor steering committee along
12 with the manufacturer steering committee and homeowners, and
13 that seemed to work well. There are many areas of common
14 ground, but there are differences and potential conflicts.

15 THE COURT: Okay. Anything else, Mr. Ouzts or
16 Mr. Farrier?

17 MR. FARRIER: Your Honor, one of our concerns is
18 just cost. And I understand the conflict issue, but we don't
19 want to ultimately have to pay for two different steering
20 committees.

21 THE COURT: Yes, sir?

22 MR. HAHN: I just wanted to thank Mr. Farrier for
23 paying for my costs at this stage of the game. It's coming
24 out of our pockets and not his.

25 THE COURT: Well, I think probably at this stage of

1 the game, based on the, at least the one case I've seen, I
2 think it's probably appropriate to have two different
3 steering committees right now. It's obviously part of your
4 defense is Mr. Hahn's client, and there is potential
5 conflicts, if not actual conflicts between the two. I'm sure
6 they will coordinate and do everything they can to minimize
7 their costs. They are going to keep records of their costs
8 as opposed -- it shows in the Case Management Order, and so
9 if there is an excessive amount of costs, then we can address
10 it at that time. And you know, the position is you don't owe
11 them anything anyway, so we'll go ahead and go that way right
12 now. If it becomes unwieldy or burdensome, just let me know
13 and we'll go -- we'll revisit it. How does that sound?

14 MR. HAHN: Thank you, Judge.

15 To that end, we have a Case Management Order that
16 was pared down from the one that the homeowners submitted
17 that sets up the steering committees. If I can hand it up to
18 the Court?

19 THE COURT: Sure.

20 MR. HAHN: And then if you want to sign that,
21 you've got it.

22 MR. LUCEY: Your Honor, we have a CMO that the
23 homeowners submitted to the Court which we had reached an
24 agreement with MI windows on most provisions. There is
25 still, I believe, two objections they have to it; one minor

1 and one major, but if I may hand it up to the Court?

2 THE COURT: Sure. Thank you.

3 MR. LUCEY: This we did provide for the contractors
4 various representations within this.

5 THE COURT: Okay. Yes, sir?

6 MR. HAHN: Judge, if I may? I think the only
7 difference, and I'm sure the homeowners will correct me if
8 I'm wrong, is on page 10 of their order, Discovery
9 Procedures, talks about the Johnson case. And I believe that
10 that is where both the contractors object and the MI Windows
11 objects. If that's not correct, I'm sure I'll be corrected.
12 And I'm happy to discuss that with you, Judge.

13 THE COURT: Okay. You are talking about paragraph
14 4?

15 MR. HAHN: Yes, sir.

16 MR. HAHN: That's --

17 MR. LUCEY: There is other minor points, I believe.
18 For one thing we needed to clarify that how the contractor
19 work was going to be referred to. We have it referred to as
20 the contractor group. I believe MI had objected to the
21 contractor/developer group, which is a totally -- they have
22 used it at one point in this.

23 Paragraph 4 is actually -- the second sentence of
24 paragraph 4 is one of the major disputes between all three
25 groups as to the initial CMO number 1. And I know MI had had

1 some objections to some of the general administrative matters
2 towards the end of CMO number 1, which we are happy to
3 address. We believe they are appropriate, and we found it --
4 actually, we went to the Bausch and Lomb case management
5 orders in preparing this, but we don't believe the
6 administrative provisions are that determinative one way or
7 the other. We believe it's clearer to include them, but I'll
8 ask Mr. Bryson to address the discovery procedures dispute in
9 paragraph 4 with regards to this order not affecting the
10 already-issued order compelling discovery in the Johnson
11 matter.

12 THE COURT: Okay. Yes, sir, Mr. Bryson?

13 MR. BRYSON: Yes, Your Honor.

14 Certainly we understand that a lot of discovery and
15 work has already been done on the Johnson case, and there
16 have been decisions that have been rendered, documents that
17 have been produced, orders that are in place, and it is
18 certainly our preference that that case continue to proceed
19 in addition to the additional discovery that we think would
20 be forthcoming, and perhaps CMO number 2 on discovery.

21 The defendants have told us that -- we met with them
22 on Windows recently and I've had telephone conversations with
23 Mr. Hahn that, well, it's no longer just the Johnson case,
24 it's an MDL now. We have a number of cases to consider and
25 that there is obligations owed to all the cases to decide how

1 best -- how best to proceed. So you can see the two kind of
2 diverging viewpoints on that.

3 We had discussion among ourselves, among plaintiffs'
4 counsel, and there certainly is precedent in other MDL's, and
5 Vioxx is one, that Mr. Arsenault was telling us about, and
6 there are some others where there were some pending state
7 court actions, and the Court, for judicial economy, in trying
8 to expedite things, continued to advance those cases. And
9 we think that that type of thing could happen here, that we
10 could have -- that we should continue to push the Johnson
11 case forward.

12 And I would ask if the Court wants to hear
13 Mr. Arsenault explain to you how the initial state court
14 action in Vioxx proceeded, as well as the MDL, that might be
15 helpful.

16 THE COURT: Sure.

17 MR. ARSENAULT: I think at the end of the day,
18 Judge, it's just garden variety judicial economy, and
19 different MDL's will take advantage of work that's been done
20 and build on that rather than starting from scratch.

21 THE COURT: What's your complaint, Mr. Hahn?

22 MR. HAHN: Thank you, Your Honor.

23 I don't presume to lecture the Court on MDL
24 procedure. I will point out that they are talking about
25 state court cases where the Federal Court doesn't have strict

1 jurisdiction on those cases.

2 The reason the MDL is set up is to have noncompeting
3 rulings and for all plaintiffs or all parties that are
4 concerned to be able to participate in the discovery.

5 What they are proposing is for the Johnson case to
6 move forward under Mr. Lucey's watch to the exclusion of any
7 other plaintiff lawyers. That means that I am going to be
8 bound by whatever happens in that case, and I see that as
9 problematic for a number of reasons.

10 Secondly, in every MDL I have been involved in when
11 the federal cases are all put before one judge, the federal
12 cases all work in lock step until such time that the Court
13 may select a date for trial, but at that point, general
14 discovery has already taken place and the major work of the
15 MDL is complete.

16 THE COURT: Thank you. Yes, sir, Mr. Farrier?

17 MR. FARRIER: I am completely with the idea of
18 judicial efficiency. And I think going forward with
19 different discovery schedules is particularly proficient. We
20 are in the process of gathering documents. Once the
21 pleadings are joined, we know what products we are working
22 with, we can begin to process the data that we have been
23 assembling, and we can move forward in an orderly fashion and
24 produce documents that are going to be usable to all the
25 plaintiffs in their respective state cases, as well as any

1 national.

2 So if the focus is on -- if the focus is on judicial
3 efficiency and economy within the parties, then the best way
4 to do it is to have this all go together at one pace.

5 THE COURT: Okay.

6 MR. OUZTS: May I, Your Honor? Counsel for MI
7 windows in the Johnson case, I do want to address how -- you
8 know, Mr. Bryson indicated that discovery has gone forward in
9 that case. Well, it really hasn't. It's at a very early
10 stage. And just to remind the Court of the sequence of
11 events, discovery didn't open in the Johnson case until
12 November 28, 2011 when we filed our 26(f) report. That was
13 10 days before these other cases filed a motion to transfer.
14 And there was motions practice to dismiss third-party claims,
15 and so -- and as Your Honor recalls on May 17th, the hearing
16 on outstanding discovery requests.

17 But Johnson is not so much different from the other
18 MDL cases, as you might expect. The other -- the only thing
19 that really separates them at this point is the motions, the
20 Rule 12 motions that are pending in the five other MDL cases
21 or four other MDL cases.

22 MR. LUCEY: And if I may, Your Honor? That's a
23 huge separation. That's a huge separation. And we've
24 actually come full circle into a separate issue, but it's a
25 related issue. The Rule 12 issue, Johnson has survived the

1 Rule 12 motion to dismiss, and Johnson is in the discovery
2 phase.

3 And the next thing the defendants are going to do at
4 this status conference or the next one or the following one
5 will be to move to stay all discovery until all other motions
6 to dismiss are heard. And they will move for a, let's say an
7 October or November filing of memoranda on motions to
8 dismiss, and it will be March or April of 2013 before
9 discovery recommences on the way they would have things
10 proceed.

11 Your Honor, the Court has already heard or compelled
12 discovery in Johnson. There is no argument being proffered
13 by anybody that the already-ordered compelled discovery will
14 no longer be relevant or usable as a result of the MDL. The
15 only argument might be that there will be more discovery and
16 we are providing for the plaintiffs not to have duplicative
17 discovery, it would only be followup or supplemental
18 discovery.

19 The contractors counsel referenced something about
20 being bound by something. There is nothing to be bound to.
21 What the Court has ordered is a production, a long overdue
22 production of relevant documents. The Court deferred the
23 Rule 30(b)(6) deposition until after the other parties got
24 involved. And that's not at issue today.

25 What is at issue is the initial document production,

1 which if Johnson continues on preparing the discovery, the
2 other parties will benefit from it; judicial economy will be
3 well served. And we would ask that the Court, having taken
4 the time and effort to have entered the Johnson order -- and
5 keeping in mind, of course, Johnson is not a transferred
6 case, it's always been here. The Court has issued the order.
7 And frankly, Plaintiff Johnson has already complied with that
8 discovery order, but the production requests have been
9 outstanding a long time. And we would ask that this CM
10 number 1, as written, not in any way affect the
11 previously-issued order in this case.

12 MR. OUZTS: Your Honor, if I may briefly respond?

13 There is a couple of things that I think the Court
14 needs to keep in mind, but the discovery order that the Court
15 entered on May 17th required MI Windows to produce documents
16 only as they related to the series 3500 windows. And it was
17 understood at that time that it would only be, at best, a
18 partial production because of some issues that still exist
19 that we'll get to later regarding ESI.

20 Now as of about -- as of this morning, we received a
21 notice of a motion filed by Johnson to amend the Complaint to
22 add additional series of windows and an additional cause of
23 action. And so now we have a motion anyway for an amended
24 pleading in the Johnson matter, which would also be subject
25 to possible Rule 12 motions. So you may even be in a

1 situation where there is a Rule 12 motion with regard to the
2 Johnson case.

3 But in any event, with -- particularly as it relates
4 to ESI, it would be very inefficient to require MI Windows to
5 do the kind of filter searching collection processing for
6 3500 series windows at a different time and then have to go
7 back and do additional filtering and searching of the ESI
8 database for the different series of windows, which is
9 what -- which is what --

10 THE COURT: What you asked me to do in March.

11 MR. OUZTS: Pardon me?

12 THE COURT: Which is what you asked me to do in
13 March.

14 MR. OUZTS: Well, to limit it to 3500, because
15 that's the only window that was involved in the case.

16 So, Your Honor, it would not promote efficiency to
17 go forward with discovery, especially document discovery, in
18 a piecemeal fashion.

19 What we would propose is that the MDL cases, the
20 plaintiffs' counsel, the steering committees in the MDL
21 cases, including the contractor class, um, come up with a set
22 of master document requests and interrogatories so that we
23 could establish a procedure to respond one time to the
24 universe of requests for production and not have to engage in
25 piecemeal discovery.

1 THE COURT: Yes, sir?

2 MR. LUCEY: Your Honor, I'm sorry, but that was
3 inadvertently incorrect, no windows were added in the motion
4 to amend. The defendant has always objected to one homeowner
5 representing all class in all three product lines. We simply
6 added two more homeowners in response to their objection.
7 The windows did not change. It's been the same the entire
8 time.

9 THE COURT: Well, the two plaintiffs that you added
10 this morning had the other two lines of windows installed in
11 their homes?

12 MR. LUCEY: Yes, Your Honor.

13 THE COURT: Okay. How many lines of windows are
14 involved in this?

15 MR. OUZTS: Your Honor?

16 THE COURT: At the most?

17 MR. OUZTS: In the latest Amended Complaint there
18 are three family lines, which is down from 11 or so in the
19 original Complaint.

20 THE COURT: I'm talking about the rest of these
21 folks.

22 MR. OUZTS: I believe it's only those three.

23 MR. HAHN: Judge, we view discovery as being broad
24 and then narrowing down, and we have alleged all the windows
25 that they made. And even if some of the lines of windows

1 aren't leaking, there may be documents later for those
2 windows that would shed light on the manufacturing defect
3 that we are alleging.

4 As an administrative issue, Your Honor, the
5 plaintiff steering committees need to get together and create
6 a document depository. In a case like this, we'll have
7 hundreds of thousands of documents. So we are not prepared
8 to accept a production until all that is done and we have
9 discussion with the defendants as to how those documents will
10 be produced.

11 THE COURT: Okay. So you have compatible electronic
12 storage systems hopefully.

13 MR. HAHN: Well, my hope would be that we would
14 have one depository that everybody would use, Your Honor, and
15 that we could work with the defendants on how those documents
16 are going to be produced.

17 THE COURT: Okay. And since, I assume for the
18 purposes of this question, that since this May 17th ruling,
19 that nothing has been produced?

20 MR. OUZTS: Your Honor, your practices and
21 procedures order stayed all discovery proceeding in the case.
22 So you are correct, nothing has been produced.

23 MR. FARRIER: But we have -- we have made at least
24 four trips to gather data, and we have well over 280 gigs of
25 data that we have gathered. We've made another trip to

1 gather data within the last week. And so we have -- the
2 first step is to gather the data, and which then needs to be
3 processed according to what we are asked to produce.

4 And I've spoken to Mr. Hahn about this, on an
5 orderly way to do this. There is no reason why within the
6 next 30 days or so the plaintiffs can't develop a master set
7 of discovery.

8 THE COURT: So you discussed that or you agreed that
9 Mr. Hahn thinks that they could do that?

10 MR. FARRIER: Well, I think it would -- it would
11 take an agreement between the two steering committees as to
12 how that would go forward.

13 MR. HAHN: I agree with Mr. Farrier. I think it
14 can be done, Your Honor, it's just a matter of you giving us
15 the authority to go out and do it.

16 THE COURT: All right.

17 Anything else, Mr. Lucey? Mr. Bryson?

18 MR. LUCEY: I would just add, Your Honor, that in
19 theory, they already did this in the last case I tried with
20 them, so they already know they are already identified. We
21 are not talking about a big effort. The requests have been
22 pending a long time, and discovery got stayed in the practice
23 and procedure order of discovery under Rule 33, 34, etcetera,
24 that order was stayed.

25 THE COURT: So that's the big problem. What's the

1 little problem?

2 MR. BRYSON: On the Case Management Order, back to
3 CMO 1, Judge, again, just to make sure we are on the same
4 page, we have a homeowners committee one before Your Honor,
5 and I think Mr. Hahn has one. I would point out just a
6 couple of the differences again.

7 Mr. Lucey mentioned the name of Mr. Hahn's group, I
8 think us and MI would think that it should be named the
9 contractor/plaintiffs committee, not contractor/developer,
10 and MI agrees with that, to my understanding. That's because
11 developers can certainly include some owners of windows.

12 I think contractors are that group that are
13 installing the windows, um, and face liability or issues that
14 are separate and distinct from an owner or a developer. I
15 don't know, maybe it's just semantical, but that does keep it
16 clean, contractor owners.

17 THE COURT: You already had t-shirts made or can you
18 change the name?

19 MR. HAHN: As long as you call me, I don't care
20 what you call me.

21 THE COURT: How about aardvark?

22 MR. HAHN: That's fine, Judge.

23 THE COURT: So you don't have any problem with
24 calling it right now the contractor/plaintiff steering
25 committee?

1 MR. HAHN: That's fine.

2 THE COURT: That's fine. All right. One for one,
3 Mr. Bryson.

4 MR. BRYSON: All right. Off and running.

5 Under the -- under C, which would be under
6 defendant's liaison counsel, did they leave in -- we had
7 preferred that under all liaison counsel, number one be
8 served as intermediary between homeowner plaintiffs counsel
9 and the Court. And I don't know if that has been deleted on
10 some of the versions Your Honor has. I know Mr. Hahn's
11 suggestion was to delete it. I think perhaps on his version
12 he left it in for homeowners, and if you did, that's fine. I
13 don't care how it is.

14 MR. HAHN: I think it's out on ours, Judge. This
15 is not a large MDL. I don't think you need to order only
16 liaison counsel can talk to the Court. It's not a big deal
17 one way or the other. I'm sure you can talk to anyone you
18 want to.

19 THE COURT: And vice versa, all right? So I'm kind
20 of confused whether it's in or out. Can you tell me?

21 MR. HAHN: It is out on ours. I'm happy to --

22 THE COURT: And so you are happy that it's out?

23 MR. BRYSON: We want it to be in.

24 THE COURT: You are in.

25 MR. BRYSON: We want Mr. Lucey to be designated,

1 and of course it is the one who serves as the intermediary
2 between our committee and the Court, would be liaison
3 counsel, that would be his responsibility. And as Mr. Hahn
4 pointed out, we'll all talk to you, but we would like liaison
5 counsel in this order to be stated as the primary contact
6 with the Court. And I think that again falls in the Bausch &
7 Lomb order in that regard. And so our version, if you've
8 got -- do you have our version in front of you, Your Honor?

9 THE COURT: I've got so many versions in front of
10 me. I'm just looking now.

11 MR. BRYSON: Yeah.

12 MR. HAHN: Judge, we have no problem with any of
13 that really.

14 THE COURT: Okay.

15 MR. HAHN: I just did not want to presume and put
16 in an order that who you want, with whom you want to
17 communicate with, that's all. And Mr. Bryson now saying
18 primary contact, I don't object to that language at all, but
19 whatever you want.

20 THE COURT: That's fine. We'll just have Mr. Lucey
21 as the primary liaison counsel, and then if he wants to bring
22 anybody with him, that's fine. If Mr. Hahn wants to come
23 with him, or he can substitute Mr. Hahn, you know.

24 MR. BRYSON: Okay. Your Honor, the next thing
25 would be -- this is a substantive change -- is in our version

1 of CMO 1, there is a Roman Numeral II that's called General
2 Case Management. We have a -- do you have one with Roman
3 Numeral II?

4 THE COURT: Okay. Got it. Page 8, bottom of page
5 8.

6 MR. BRYSON: Yes. Mine has been red lined. Yes,
7 bottom of page 8.

8 And Your Honor, we did have something, by way of a
9 bit of a background, that had more expansive -- in
10 conversations with Mr. Hahn, we realized there were many
11 areas of disagreement, so we carved all of that out and we
12 tried to just put into the Case Management Order very basic
13 information that we believe needs to be set in this first CMO
14 with regard to, you know, orders, electronic filing, um,
15 status conferences.

16 It's our proposal, Your Honor, that a status
17 conference be held every six weeks. We thought -- of course
18 that's Your Honor's determination on that, but it seemed to
19 us --

20 THE COURT: That's fine.

21 MR. BRYSON: -- six weeks seemed about right. A
22 month was too much; two months seemed to be too long.

23 THE COURT: When you have future hearings, you don't
24 have to come here. If you want to come here, that's fine; if
25 you want me to go somewhere, that's fine, to make it more

1 equitable for travel expenses. I don't mind going anywhere.
2 And if anybody wants to attend by telephone on things that
3 are not substantive, I'll be glad to have them do that, too,
4 we can crank that up. You know, if it's a motion to dismiss
5 or summary judgment or something important, I would like to
6 see a face, but anything otherwise, scheduling or, everybody
7 is welcome to not come and attend by telephone.

8 MR. BRYSON: Okay. Thank you, Your Honor. Perhaps
9 we could set up a normal dial-in number for those that might
10 dial in. If there is any state court actions that are filed,
11 we are not currently aware of any, people that might be
12 interested in dialing in.

13 And then under Discovery Proceedings, you've
14 heard -- that's one paragraph under section 4, and you've
15 heard the arguments with regard to that.

16 Section 5 of this order is attorney time and expense
17 records. We think it's appropriate and common to have all
18 counsel keeping contemporaneous time records, particularly on
19 the plaintiffs' side. That's of course a common, common
20 thing.

21 And then you can see Communications Among Counsel.
22 To our understanding, there was no, with the exception of the
23 information about the discovery proceedings, there was no
24 objection to this language.

25 I think the primary objection MI has in the current

1 version to the Court is that CMO 1 should really just set out
2 leadership in the committees and save these additional things
3 for the next CMO. Our position would be this language is not
4 objectionable and that it, we ought to go ahead and get it
5 put in the very first CMO.

6 THE COURT: Okay.

7 MR. FARRIER: That's putting the cart before the
8 horse. And that's the position we took when we met with some
9 of the plaintiffs' counsel and went over their original CMO 1
10 and CMO 2. Roman numeral II forward were all in CMO 2, which
11 we had, I believe, and still believe should be deferred until
12 the leadership is put in place, and we can move forward to
13 some of the management and discovery issues. And so we
14 object to Romans II forward in the proposed CMO submitted by
15 Mr. Bryson, and specifically object to the continuing attempt
16 to push Johnson out into some super category of different or
17 differentiated discovery. The CMO that was submitted upon
18 the one objection that's now been ruled upon is actually the
19 CMO 1 from Bausch & Lomb.

20 MR. BRYSON: The only thing I would add to that,
21 the cart before the horse, is just now that order that the
22 clerk is going to deliver, orders to liaison counsel, why
23 should that not be in the first one, Electronic Filing and
24 Service, follow the District of South Carolina's policies and
25 procedures on electronic case filing. I mean, we have

1 counsel from a number of states who are, you know, becoming
2 acclimated to this Court's procedures and the possibility of
3 new cases being filed. I think attorneys need some of these
4 basic things, status conferences will be, telephonic
5 conferences, the one on discovery procedures, Your Honor can
6 rule on that, but that's just one paragraph. The rest of the
7 information I think is just good informational type
8 paragraphs to have in this initial CMO.

9 THE COURT: Mr. Farrier, why wouldn't you want these
10 counsel to keep contemporaneous time records, since your
11 client is objecting?

12 MR. FARRIER: I won't object to our meeting every
13 six weeks.

14 THE COURT: That's five and six. So you are
15 unobjecting to them now, is that what you are telling me? So
16 except for your objection and Mr. Hahn's objection to the
17 Johnson case, do you have any specific objection to
18 paragraphs 2, 3, 4 and 5 as a general matter?

19 MR. FARRIER: Four, absolutely.

20 THE COURT: Well, 4, pending my decision, is going
21 to say, the Case Management Order related to the discovery
22 procedure will be entered separately. You don't have any
23 objection to that?

24 MR. FARRIER: No.

25 THE COURT: Okay. It's just -- so do you have any

1 other objection to paragraph 2, which is Orders, Electronic
2 Filings, Separate Dockets and Separate Filing?

3 MR. FARRIER: I do not.

4 THE COURT: How about 3?

5 MR. FARRIER: No.

6 THE COURT: How about -- 4 is still up in the air.

7 Five, you know -- 4 is either going to say that
8 first paragraph, first sentence which you have no objection
9 to, or the second sentence, which you do. I haven't decided
10 that yet.

11 Attorney's Time and Expense, no problem?

12 MR. FARRIER: No, sir.

13 THE COURT: And generally -- General Application of
14 Orders, no problem?

15 MR. FARRIER: No problem.

16 THE COURT: And Communication Among Counsel, no
17 problem?

18 MR. FARRIER: We'll do so.

19 THE COURT: Okay. So I'll enter all of that, and
20 I've still got the Johnson issue pending, okay?

21 All right. What else do we have?

22 MR. BRYSON: Your Honor, we have a Case Management
23 Order number 2 that we have submitted to and had
24 conversations with MI about. Mr. Hahn, I believe, had raised
25 some objections with your -- with Your Honor about not having

1 had sufficient time to review it, and he certainly can expand
2 on that.

3 Your Honor, it's our desire to get a Case Management
4 Order number 2 entered as quickly as possible, and it's with
5 regard to discovery. I do think that the Court's ruling with
6 regard to how you are going to handle the Johnson case,
7 though, makes a big difference as to how this particular
8 order shakes out.

9 If you read our draft Case Management Order number
10 2, there is information in there about discovery proceeding
11 in the Johnson case and how that would interact with the
12 other cases.

13 We do think with regard to discovery or -- I'm
14 sorry -- master discovery, we have had some conversations
15 among ourselves and on the homeowners side, and it has been
16 our experience that the more common practice of late is to
17 develop a plaintiffs' fact sheet or plaintiffs' profile form,
18 a defendant's facts sheet, defendant's profile form, and
19 maybe a contractor fact sheet, profile form, which are
20 exchanged among the parties and questions that are agreed
21 upon. So that once that's agreed upon, they are going to
22 provide that information. So we don't serve interrogatories
23 and get a lot of objections, we try to handle all the
24 questions on the front end, get those agreed upon and just
25 have them answer that information.

1 So we think maybe it's a bit semantical, but that in
2 place of doing written discovery or master discovery, instead
3 that we have three sets of profile forms or fact sheets that
4 would be developed, and that would be then exchanged among
5 the parties. And that would be -- that would be a change
6 from the draft CMO that we had submitted to Your Honor, as
7 well as to the other parties.

8 And again, it's an effort to try to avoid, you know,
9 objections in discovery. Let them see the questions on the
10 front end. And that's worked well not only in Chinese
11 Drywall, but in a number of other MDL's that other counsel
12 have been involved with.

13 But the other thing on CMO 2 is that there are some
14 sections in that CMO that pertain to -- there are some other
15 sections that they have objected to. So we would like CMO 2
16 being -- portions of it we don't think there is objections,
17 but we are really not sure where the defendants stand with
18 some of the other language we put in the CMO.

19 MR. HAHN: Your Honor, if I may?

20 I think Mr. Bryson made part of my argument, which
21 is we don't really have enough information today to submit a
22 CMO 2. And once you put the leadership in place, the three
23 different groups need to meet and negotiate. I was in a hard
24 negotiation in this, I don't know what has been agreed to and
25 what's been left off the table. I know there is some

1 deviations from the Federal Rules and there are other issues
2 that we are uncomfortable with and we don't need to take up
3 your time with.

4 I would ask Your Honor to give us a general feel for
5 the type of disparity you expect us to cover in a CMO 2, and
6 charge us to sit down in the next 30 days and come up with an
7 agreed-upon order we can submit to the Court.

8 THE COURT: The problem with that is is that you are
9 asking the person that knows the least about this case to
10 manage the rest of you who know the most about this case.

11 MR. HAHN: Understood, Your Honor.

12 THE COURT: Talk about the blind leading the blind.

13 MR. HAHN: Well, just generally, there are issues
14 with deviations from the -- and we can discuss it among
15 ourselves and hopefully come up with an agreed-upon order.
16 We have in every MDL we have been involved in; I can't
17 imagine we can't do so here.

18 THE COURT: Yes, ma'am?

19 MS. LUMPKIN: Your Honor, if I may? We agree with
20 Mr. Hahn on most of what he's addressing with the Court as to
21 CMO 2. We think it's a bit premature. We agree with what
22 Mr. Bryson has mentioned with regard to moving this forward
23 and coordinating it, setting up some appropriate protocols,
24 but one of the issues that we think factors into what happens
25 with discovery and how it's structured, putting aside fact

1 sheets and some of these other deviations from what we have
2 in front of us, we have pending motions to dismiss that have
3 been fully briefed in almost all of the cases. And now with
4 the Third Amended Complaint, there is likely to be one there,
5 too. And I think that that probably would streamline and
6 assist the Court with getting to know what the issues are in
7 the various cases under those state laws and trying to set
8 that in motion as we work simultaneously towards putting
9 together a CMO 2 that works for everyone.

10 THE COURT: Let me ask you a question: Since I
11 think it's the North Carolina case that has a motion to
12 reconsider pending, and I certainly can't handle that because
13 I can't reconsider something I never considered, how
14 physically do you do that?

15 MS. LUMPKIN: Well, Your Honor, we were going to
16 request that the Court set a briefing schedule so that we
17 could move to get that case back to North Carolina. Because
18 not only is there a pending motion for reconsideration, Judge
19 Mullen requested additional research as to certain issues.
20 And Mr. Shipley is here who is handling that and can
21 certainly add anymore information that the Court may have. I
22 think you are absolutely right, it would be difficult for you
23 to reconsider the issue and address the additional research
24 that Judge Mullen has requested. So we were going to file
25 our motion for remand, recommend that it go back as to that

1 one motion, but the rest of the motions are fully briefed and
2 they are pending.

3 THE COURT: Okay. So you are going to have to hear
4 those sooner or later. So while you are here, why don't you
5 pick a date to hear those motions to dismiss and we'll have
6 hearings on those motions to dismiss.

7 Now, my schedule will not permit hearing those
8 motions to dismiss until after August the 23rd. So any time
9 after August the 23rd, I'll be ready to roll. They will be
10 here; I'll be in Africa. Not August the 28th because I've
11 got a jury panel coming in. But if you just select some
12 dates that are convenient, and I guess we can -- there are --
13 I think there are five motions to dismiss pending.

14 Is that right?

15 MS. LUMPKIN: There are four, Your Honor, for the
16 cases that are actually before the Court right now, not the
17 three conditionally. Even though there are pending motions
18 there, they haven't actually been transferred here, and there
19 is a pending motion to vacate as to those three conditional
20 transfers. My understanding is JPML will be entertaining
21 that at the end of July. So probably by the time we set this
22 hearing we will have a better understanding as to whether or
23 not it will be the four that are presently pending in front
24 of the Court or seven.

25 THE COURT: Okay. And I don't know how long it's

1 going to take to do seven motions to dismiss. I would
2 imagine, looking at this crowd, it's going to take a while.
3 So you need to select Monday, Wednesday and Friday of one
4 week or something like that, two and three, or two, three and
5 three, I don't know how long it's going to take. I'll let
6 the lawyers figure that out and you just call my office and
7 schedule it and I'll be ready to go.

8 MS. LUMPKIN: One other thing about the other
9 cases. To alleviate the pressure on the Court, especially
10 with the schedule Your Honor just discussed, we would also
11 suggest if the Court wanted to recommend that the motion to
12 dismiss be heard in the original jurisdictions, they were
13 filed there and fully briefed there, we would be willing
14 to -- you know, if that's the way the Court would like to go.

15 THE COURT: I think the reason for it being here is
16 I'm supposed to do all the work, unfortunately. So probably
17 better off then I'll learn about the cases, and I'll have a
18 better idea on discovery. So I think I'll unfortunately keep
19 everything except the motion to reconsider, I'll say that.
20 How about that?

21 MS. LUMPKIN: Thank you.

22 THE COURT: Now, is there any objection from the
23 plaintiffs remanding the case that has the motion to
24 reconsider pending to North Carolina for the resolution of
25 that order or that motion?

1 Isn't that yours, Mr. Bryson?

2 MR. BRYSON: Your Honor, that's our case.

3 You know, that motion -- the motion to dismiss was
4 denied and then they have the motion to reconsider, and it's
5 just been pending. That was a motion they filed that's been
6 pending for a long time, I think like a year and a half
7 perhaps. And then the case, you know, then the case was
8 transferred here. So I don't know to what extent the Judge
9 is going to change his ruling. I mean, he denied the motion
10 and then they just filed a motion to reconsider it, so --

11 THE COURT: Well, statutorily required no. So what,
12 you said Judge Mullen?

13 MS. LUMPKIN: Yes.

14 THE COURT: Graham Mullen.

15 MS. LUMPKIN: It's February of 2012 when the Judge
16 requested additional research on the statute in the --

17 THE COURT: It's Judge Graham Mullen in Charlotte,
18 as opposed to a state court judge? I didn't know.

19 MS. LUMPKIN: It's a federal judge. I apologize.

20 THE COURT: I know him. Okay. Fine.

21 So again, going back, Mr. Bryson, is there any
22 objection to remanding the case to Judge Mullen to
23 reconsider? I find it hard enough to do it, I don't think I
24 can do that one. You can think about it and just let me
25 know. How about that?

1 MR. BRYSON: Right. You know, we are here, Your
2 Honor, and we object to the case being sent back to North
3 Carolina -- certainly on the motion to reconsider. And
4 then -- but we can -- if Your Honor -- it sounds like we can
5 provide some information to you on our position on that in a
6 few days.

7 THE COURT: I can call Judge Mullen. I'll probably
8 see him in San Francisco on Monday. So if you want a
9 hearing, I'll get you a hearing.

10 MR. BRYSON: That would be fine.

11 MR. SHIPLEY: Your Honor, my name is Curtis Shipley.
12 And we are perfectly fine with the case going for that
13 purpose. It makes the most sense. It serves judicial
14 economy. The motion is fully briefed. Initially in July of
15 last year, Judge Mullen asked for additional briefing in
16 February pending in this matter. We think it probably could
17 be resolved fairly quickly.

18 MR. BRYSON: Could we suggest that Your Honor call
19 Judge Mullen and ask what his preference is on this? We are
20 certainly -- I don't know that he's going to make any
21 different decision as to his original motion that was denied,
22 but that Your Honor contact him and ask what his preference
23 is?

24 THE COURT: Sure. I mean, I'll be glad -- and
25 again, if Mr. Bryson -- I'm just throwing it out because we

1 are having a general meeting -- if in fact you have any
2 authority -- and I looked it up -- we tried to look it up
3 whether -- I mean, I don't have any problem with the
4 authority to decide the motion to dismiss, but it's just the
5 problem of the motion for reconsideration, since it's, you
6 know, hard for me to reconsider something that I haven't
7 considered in the beginning. And I don't know whether Judge
8 Mullen would like me telling him he was wrong or right.

9 So I'll be glad to talk to Judge Mullen and get a
10 hearing on that case if in fact you want me to. If you think
11 that I have the ability to decide that, just let me know and
12 I'll decide whether I can decide it or not.

13 How does that sound?

14 MR. BRYSON: That's fine. Thank you, Your Honor.

15 THE COURT: Either way I'll call Judge Mullen.
16 Okay. And could you give me the case, the North Carolina
17 file number on that one?

18 MS. LUMPKIN: I have it, Your Honor. It's case
19 number 2:11-CV-011. I'm sorry, I apologize, 3:10-CV-00427.

20 THE COURT: So 3:10-CV-00427?

21 MS. LUMPKIN: Yes, Your Honor.

22 THE COURT: Okay. Got it.

23 All right. What else is there?

24 MR. BRYSON: Your Honor, back on the CMO 2, then,
25 which is with regard to discovery, I think again when Your

1 Honor makes the ruling on Johnson and how you are going to
2 handle that, that will allow us then to meet with defense
3 counsel and then bring CMO 2 before Your Honor before the
4 next status conference.

5 THE COURT: Sure.

6 MR. BRYSON: And hopefully within 30 days we would
7 have that. I would propose we submit to Your Honor a
8 proposed discovery scheduling order. There may be objections
9 and the parties could indicate if they have points of
10 objection, that way Your Honor would have two weeks at which
11 to decide whether to go ahead and enter the order prior to
12 the status conference or to raise questions at the next
13 status conference about the points of contention, if any.

14 THE COURT: Okay. All right. So give me 20 minutes
15 and I can talk to my lawyers and I'll be back and I'll make a
16 decision. How does that sound? All right. And y'all can
17 talk in the meantime.

18 (Thereupon, there was a brief recess.)

19 THE COURT: Okay. Anything else by anybody else
20 about anything else right now?

21 MR. LUCEY: Not on the matter under advisement, but
22 there were several --

23 THE COURT: Let me ask you a question on the motion
24 under advisement. Mr. Farrier, if I understand you correctly
25 that you have been taking trips to Pennsylvania. Is that

1 where your home office is?

2 MR. FARRIER: Not me personally, we've got a --

3 THE COURT: The corporate you, okay?

4 MR. FARRIER: Yes.

5 THE COURT: One of the people lower on the
6 letterhead than you is going to Pennsylvania and going
7 through to get the discovery for these, this class action and
8 collate all the windows, is that what we are talking about,
9 all the lines of windows?

10 MR. FARRIER: Focused primarily on 3500's, and we
11 assume. But we are -- there is an overlap of data, and
12 frankly, we have to process it. So we want to know what's in
13 there.

14 THE COURT: So are there -- I mean, since it would
15 be highly unlikely that other lines of windows will not be
16 involved in this nationwide case sooner or later, are you --
17 are there plans to go forward and get the same information
18 with regard to the other lines of windows?

19 MR. FARRIER: Yes.

20 THE COURT: Okay. And do you have an estimate as to
21 how long that's going to take despite whatever I do with this
22 issue on this case?

23 MS. LUMPKIN: An estimate as time to process the
24 information?

25 THE COURT: Do you have the information available to

1 push the button to give them the discovery, whatever lines of
2 windows, other things show up, the majority of the discovery,
3 whatever is available right then?

4 MS. LUMPKIN: Your Honor, the answer to that is,
5 without talking -- you are dealing with a lot of moving parts
6 as to the 3500's, that is a true statement. Yes, it's put
7 together and there at the moment it has not started. Because
8 frankly at that point once we start to bring it down from the
9 gigabytes that 3500, there are hits within 3500 and we start
10 the minimizing process, it's substantial amounts of money.
11 So when we have the stay order from this Court, we waited
12 because we wanted to see what the Court was going to do in
13 the MDL discovery moving forward.

14 Having said that, going back to the other series of
15 windows, the universe of documents have not all been
16 gathered, but we have gathered chunks of them. It's the
17 cost, it's cost prohibitive. So we are hoping to try to work
18 with plaintiffs' counsel to come up with the type of protocol
19 for CMO 2 and figure out what the master discovery is going
20 to look like so we can then expend more of that money.
21 Because frankly at some point we are going to have to look at
22 cost sharing because it's very expensive.

23 THE COURT: Okay. And your contemplation and
24 discussions with regard to the universe of discovery under
25 CMO 2, or whatever, 3, or whatever it's going to be, includes

1 other lines of windows than the 3500?

2 MS. LUMPKIN: Yes.

3 THE COURT: Does it include all 11 lines of windows,
4 as Mr. Hahn referred to earlier today?

5 MS. LUMPKIN: I believe we focused on 8500's,
6 4300's, because some of these other lines of windows there
7 haven't, while I know they are listed in some of the
8 complaints, not all of them -- we have not -- there has to be
9 a little bit more discussion as to whether they were even
10 sold in those states and what they represent.

11 MR. FARRIER: Your Honor, just to further flesh
12 that out a little bit, because I think I understand where the
13 Court is going, we are still engaged in gathering the data.
14 Once we have gathered that and have a discussion about what
15 plaintiffs actually want, we can run some test runs and we'll
16 be able to give a fairly accurate estimate of the number of
17 weeks it will take to both process and review that data.

18 THE COURT: Okay. Yes, sir, Mr. Lucey?

19 MR. LUCEY: Just to clarify something, Your Honor.
20 There are 11 lines of windows. There are three lines in our
21 original Complaint. We listed out the variations within the
22 lines to make sure that we were being clear that we were
23 including everything, but the variations are all within the
24 three lines. So it is three lines.

25 And in the previous MI production, there have been

1 very little overlap between the different windows and
2 information produced. In other words, there is either 3500
3 information or there is 4300 information. They are barely on
4 the same page, with the exception that the 3500 and the 8500
5 share the same sashes and sash parts. So on those drawings
6 and on those building materials and on those type of
7 documents, you will get both lines on the same document, but
8 other than that, there is typically very little overlap.

9 THE COURT: Where did your other eight lines of
10 windows come from, Mr. Hahn?

11 MR. HAHN: Um, Your Honor --

12 THE COURT: I thought I understood you to say you
13 had 11 lines, but I mean, you know...

14 MR. HAHN: Well, we have listed in our Complaint 1,
15 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and not limited to just
16 these. Some of those are subsets of the 3500 and the 8500.
17 At this stage we are looking for broad discovery and
18 narrowing it down because that's typically where you find the
19 good stuff.

20 THE COURT: You mean you find the good stuff in the
21 broad discovery and then you narrow it down?

22 MR. HAHN: Yes, sir.

23 THE COURT: And it's my understanding also that as
24 far as the Johnson case, that nothing has been produced.

25 MS. LUMPKIN: At this point, Your Honor, nothing

1 has been produced other than third-party documents that I
2 believe Mr. Lucey requested.

3 THE COURT: Except what Mr. Lucey already had in his
4 possession. I mean, that wasn't produced in this litigation;
5 he had it in his possession from prior litigation.

6 MS. LUMPKIN: Right.

7 And our understanding at that May hearing, the Court
8 ruled that he should not be using that for the purposes of
9 this case.

10 MR. LUCEY: I'm not hearing counsel. I can't hear
11 what she's --

12 MS. LUMPKIN: I'm just saying that the Tennyson Row
13 documents, which is what I believe the Court is referring to,
14 I believe on the May 17th hearing, after the subpoena issue
15 was addressed, I believe the Court said you could maintain
16 those documents but that you could not use them in light of
17 the confidentiality order that wasn't complied by.

18 MR. LUCEY: The Court never said anything about not
19 using them, Your Honor. You said hold on to your documents.

20 THE COURT: Okay. I didn't think I said you
21 couldn't use them, so -- but you know -- okay.

22 I'm going to in subparagraph 4, Discovery
23 Procedures, I'm going to strike the second sentence. I think
24 we -- the best thing to do right now is because although the
25 Johnson case is an older case, through legal procedures it

1 hasn't gone very far, despite Mr. Lucey's valiant efforts to
2 advance the ball. But Mr. Lucey is probably correct that if
3 there will be a motion to stay discovery pending the motion
4 to dismiss, that probably will not have a half life of 10
5 seconds. I mean, there isn't one. I'm just telling you that
6 watch out if you make that one because you may get an answer
7 by return mail, because I will call Judge Mullen, probably
8 this afternoon. I'm going to get a copy of the pleadings
9 when we go back upstairs. So although we are going to be in
10 lock step, I'm going to do the best I can, which is my
11 charge, to get the discovery moving in this case, which is
12 what -- everybody wants to know what this case is all about,
13 and so that's my goal.

14 And I sometimes -- I share Mr. Lucey's frustration,
15 but I think this is probably the best way to go right now,
16 okay?

17 All right. What else?

18 MR. LUCEY: Just to clarify on that aspect of your
19 ruling, the Court is removing that sentence; it's not making
20 any ruling about whether or not that -- what the effect of
21 that May 17th order is at this time, and that will be argued
22 at another --

23 THE COURT: Okay.

24 MR. LUCEY: -- status conference, I take it?

25 THE COURT: That's fine. I'm just doing the CMO.

1 So removing that it just says, Discovery Procedures, it is
2 going to say a Case Management Order related to discovery
3 procedures will be entered separately.

4 MR. BRYSON: May it please the Court?

5 Is it okay with our suggestion that within 30 days
6 we would have -- all the parties would have submitted to Your
7 Honor proposed Case Management Order number 2 on discovery to
8 give Your Honor two weeks in which to decide what you want to
9 do?

10 THE COURT: If you do me a favor and submit one
11 order as opposed to three orders and highlight or red line,
12 or however you do it, to bring to the Court's attention what
13 the --

14 MR. BRYSON: What the party contends.

15 THE COURT: -- what the problem is, you know, so I
16 know what's at issue. Because starting to throw around these
17 orders, especially when it gets confusing -- and I make
18 enough bad decisions when I'm not confused.

19 MR. BRYSON: Your Honor, for the record to be
20 clear, I know Your Honor said you were going to contact Judge
21 Mullen with regard to the Deblaker case, we would ask that we
22 be given 10 days in which to provide an official response to
23 the Court and just -- we huddled among ourselves while you
24 were on recess. And we certainly believe that when a case is
25 transferred for all purposes, for all purposes would be all

1 the motions that may be out there pending, even the motion
2 for reconsideration, there are standards that apply to that.
3 And we'll certainly be searching for authority on that, but
4 likewise, as well, that you can't have remands for limited
5 purposes. That would be inappropriate. And that at the very
6 worst, you know, they could refile their motion to dismiss in
7 this particular action with regard to the North Carolina
8 case, if that's how the Court decides that.

9 THE COURT: I'll hold off calling Judge Mullen until
10 you -- in 10 days you give me whatever your positions are.
11 So I won't call him and stir him up, but I will -- I'll get a
12 copy of the pleadings. I mean, we are going to get those
13 when we go back upstairs. So I'll just wait for your
14 response. I would like to get it before the 1st of August
15 because that's when my plane leaves for Africa, all right?
16 So I can give you -- so y'all can work while I play, which is
17 my job.

18 Yes, sir?

19 MR. PERRONE: Thank you, Your Honor.

20 THE COURT: Could you move the microphone, because
21 sometimes Mr. Lucey and I have a hard time hearing, and I
22 think the court reporter does, too, and she's the most
23 important person around.

24 MR. PERRONE: Yes, sir. Thank you.

25 Just to bring to your attention, with respect to the

1 motions to dismiss that we all talked about, I just want you
2 to know that we also will be filing a motion to dismiss the
3 Lakes of Summerville case. We accepted the pleading, we
4 waived service, but we have not yet responded. And so we
5 will be filing a motion to dismiss or consolidate that action
6 with this action.

7 And if it wasn't clear, with respect to Mr. Lucey's
8 Third Amended Complaint, if Your Honor grants the motion to
9 amend, we will then be filing a motion to dismiss with
10 respect to that Complaint, as well.

11 THE COURT: Okay. Well, let me ask you: Are you
12 going to file an opposition to his proposed Third Amended
13 Complaint and then I'll decide that, and then file a motion
14 to dismiss, or you just want to go ahead and file the motion
15 to dismiss?

16 MR. PERRONE: Your Honor, I think we are willing to
17 accept the Third Amended Complaint.

18 THE COURT: Okay.

19 MR. PERRONE: We'll accept service of the Third
20 Amended Complaint and then we will file our motion to dismiss
21 so that all of the motions can be returnable before Your
22 Honor at the same time.

23 THE COURT: Then on the motion for filing the Third
24 Amended Complaint which was filed this morning, I'll grant
25 that motion. We'll mark that granted. How does that sound?

1 MR. PERRONE: Thank you, Your Honor.

2 THE COURT: All right. Thank you.

3 Yes, ma'am? Anybody else?

4 MS. LUMPKIN: Yes, sir, a point of clarification.

5 I stand corrected, Your Honor, as to that issue on Tennyson
6 Row. You are absolutely right that you did not tell Mr.
7 Lucey that he could not use them. Mr. Lucey agreed on the
8 record as part of the transcript May 17th that he not
9 disclose those confidential documents to other counsel in
10 other cases until such time as there is a standard discovery
11 or Case Management Order in the MDL cases or a standard
12 confidentiality order in the MDL cases.

13 THE COURT: Okay.

14 MS. LUMPKIN: That's what I was referring to in the
15 May 17th transcript.

16 THE COURT: Okay. No problem. All right. So you
17 are still not going to do that. And then if Mr. Lucey wants
18 to do that after the Case Management Order, just go ahead and
19 give you some notice. If you don't like it, call me and
20 we'll take care of that at the time.

21 MS. LUMPKIN: After you enter this Case Management
22 Order confidentiality agreement, which was negotiated between
23 Mr. Ouzts and Mr. Lucey, that never got entered by the Court.

24 THE COURT: Okay.

25 MS. LUMPKIN: So that's still an issue with regard

1 to any kind of production going forward.

2 MR. LUCEY: I brought an extra copy for Your Honor.
3 For whatever reason, the confidentiality order had not been
4 entered.

5 THE COURT: It was probably Friday afternoon.

6 MR. LUCEY: It has attachments. This was on the
7 record on May 17th.

8 MR. HAHN: I've never seen it, Your Honor.

9 THE COURT: It's probably yours, we probably copied
10 it.

11 MR. HAHN: It would be.

12 MR. LUCEY: It's the standard confidentiality
13 order. And this order was stipulated in Johnson and we were
14 going to address broadening it with the Court separately, but
15 that was stipulated on the record, and then we submitted it
16 to you after Johnson with what we agreed to on the record.

17 MR. HAHN: What I would like to do is when we
18 negotiate a CMO 2, that we attach a confidentiality order to
19 that.

20 MR. LUCEY: We intend to move on the failure to
21 comply with your May 17th order, and the only excuse that
22 they might proffer is that we haven't gotten an executed
23 confidentiality order back from the Court. But we would --
24 this applies to Johnson.

25 And we are ready to address the second issue, and at

1 least get the Court's input. If the Court will recall --

2 THE COURT: Okay. Just because I didn't enter it
3 because of oversight, and you weren't around at the time
4 because you weren't a party, I'll mark it entered, okay? If
5 you have any objection to it or you have any clarification
6 you want to make, any additions, just let me know and you can
7 negotiate it among yourselves or just let me know, okay?

8 MR. HAHN: Your Honor, I'm troubled by what Mr.
9 Lucey just said, that he intends to move forward with the
10 Johnson case. I thought that was something that we had
11 discussed and we all need to move together as an MDL, so --

12 THE COURT: Okay. Well --

13 MR. HAHN: -- that's problematic.

14 THE COURT: Have a drink. Talk to him over a drink
15 tonight, okay?

16 MR. OUZTS: Your Honor, just one point of
17 clarification. With regard to the Johnson confidentiality
18 order and the Claw-Back order, by their terms, they are both
19 limited to the Johnson case, just because that's all that was
20 before the Court at that time. So if those are the orders
21 that are going to be used, then we just -- in all the MDL
22 cases, that change needs to be made in those orders.

23 THE COURT: Okay. I mean, y'all haven't seen -- how
24 about, Mr. Bryson, the rest of the plaintiffs and you have no
25 problem with this order?

1 MR. BRYSON: That's correct, Your Honor.

2 THE COURT: Okay. All right. So we'll just broaden
3 it to cover the MDL, all the cases in the MDL, all right?
4 And with the ability of Mr. Hahn to take a look at it and
5 make any additions or corrections or any objections to it.

6 MR. HAHN: Thank you, Judge.

7 THE COURT: All right. So Catina, is that entered
8 now? I don't need to sign anything now. You got it. All
9 right.

10 Do you want this back, Mr. Lucey?

11 MR. LUCEY: Thank you.

12 THE COURT: Thank you. What else have we got,
13 anything?

14 MR. LUCEY: Yes, Your Honor. There were a number
15 of timing and date issues. It seems like we should defer
16 addressing those until the status conference that we'll have
17 sometime around when you are hearing the motions to dismiss.

18 We did consult during the break and as of now MI's
19 focusing on September 4th through 7th for their dates. We
20 are pretty flexible on the plaintiffs' side. So we hope to
21 have those dates more cemented for the Court shortly.

22 MS. LUMPKIN: I spoke to Mr. Lucey, we are trying
23 to work out the dates. In light of the fact that Your Honor
24 has a very full schedule and is going to be out of town and
25 we have the JPML coming in probably at the end of August with

1 a decision as to the other three, we had picked the first
2 week or second week of September, but I told Mr. Lucey I
3 needed to confirm this with other counsel. Mr. Ouzts has now
4 advised me that he is out of town on a family planned
5 vacation for that week.

6 MR. OUZTS: I think that's correct. I need to
7 check with my wife to be sure.

8 THE COURT: Let me -- am I going to have to have all
9 of y'all here for every hearing? Not that -- I'll miss you.
10 I mean, if you were substantively going to argue those
11 motions, that's one thing, if you were going to sit there and
12 watch Mr. Farrier or your law partners argue them, that's
13 another thing.

14 MR. OUZTS: Your Honor, fair point. And what I was
15 anticipating is there may be a motion to dismiss in the
16 Johnson case, which I would be --

17 THE COURT: Why don't we hear the rest of them. If
18 there is a motion to dismiss in the Johnson case, I can do
19 that when you are back from vacation. Mr. Farrier, I think
20 the second week is problematic, because I think I'm supposed
21 to be in San Diego, the week of the 4th of September is
22 better, okay? So if we can narrow it down there.

23 MR. FARRIER: Understood.

24 THE COURT: And specifically if there is a motion to
25 dismiss in the Johnson case, we'll wait for Mr. Ouzts, who

1 will be refreshed and relaxed, and having spent time with his
2 family, will be glad to be back in court.

3 MR. OUZTS: Absolutely, Your Honor.

4 THE COURT: Okay. All right. Anything else?

5 MR. LUCEY: Item five, Your Honor, was bringing up
6 the issue of early settlement discussions. We brought that
7 up with the 26(f) conference, never got a response. We want
8 them to know the door is always open.

9 THE COURT: Okay.

10 MR. LUCEY: We assume that they want to defer on
11 that.

12 MR. FARRIER: Any time they want to talk about a
13 resolution, including dismissal with prejudice, we are happy
14 to -- we are happy to talk any time.

15 THE COURT: Okay. No problem. I got you.

16 MR. LUCEY: Item 7 A, Your Honor, is MDL procedural
17 matters, direct filing of additional actions, which has been
18 quite common and would facilitate -- I believe would
19 facilitate the organization here. We know that Kansas is
20 getting filings and we wanted to get the Court's guidance on
21 that, the direct filing of additional actions here in South
22 Carolina.

23 THE COURT: Yes, sir?

24 MR. PERRONE: Your Honor, we would respectfully
25 suggest that you decline the offer to permit direct filing.

1 We don't really know what's going to happen, whether there is
2 going to be a Kansas case, an Iowa case, a California case,
3 but I think that the best course of action would be for the
4 Court to require that those actions be filed in their own
5 home states. If they are ever going to be filed, they can
6 then go to the JPML and seek a transfer here as tag along
7 cases, Your Honor can conduct discovery, rule on motions, but
8 as opposed to Your Honor then being required to try those
9 cases as direct filed cases, they would then go back to their
10 home states, just like all these cases will go back to their
11 home states. If Your Honor permits a direct filing, you will
12 be living with those cases until the conclusion of a trial.

13 Now, that's obviously within Your Honor's
14 discretion, but that may be an issue that Your Honor does not
15 have to tackle today. There are no other cases filed yet. I
16 think the better course would be to let this unfold a little
17 bit and see what actually happens.

18 THE COURT: I guess the argument, it's less work for
19 you, Judge, always works, but go ahead.

20 MR. BRYSON: Your Honor, I was just going to say I
21 would hope that Mr. Perrone and MI would perhaps reconsider,
22 maybe even as we speak to them tonight during negotiation of
23 the CMO 2, I don't think does not necessarily stay from the
24 beginning to the end before Your Honor, it could always be
25 sent back. We are just trying to alleviate the step of if

1 there is a direct, why go through the trouble of filing it in
2 say, Kansas, and transferring it here when we could just
3 transfer it here, you can do all the things that are
4 appropriate for the MDL, and it can be sent back to the
5 appropriate jurisdiction. It does not mean that it has to be
6 here the whole time, and it saves a lot of time and is more
7 judicially economical to do it that way. But there is no
8 motion pending before Your Honor on that and perhaps we can
9 have further negotiations on that.

10 THE COURT: Why don't y'all negotiate that and we
11 can take care of that in the next meeting.

12 MR. PERRONE: We would be on the same page with
13 respect to the discovery issue. And none of us, I wouldn't
14 want to inadvertently fall into a situation where the cases
15 must stay here.

16 THE COURT: That's fine.

17 MR. LUCEY: As far as less work for you, Your
18 Honor --

19 THE COURT: So pending that I guess they should file
20 them in the districts. If somebody wants to file the case
21 for the next six weeks, I guess they don't have any choice
22 but to file them in their home districts, okay?

23 MR. PERRONE: Yes, Your Honor.

24 THE COURT: Yes, sir.

25 MR. HAHN: I would like to be included in that.

1 There is some choice of law issues that need to be addressed,
2 as well.

3 THE COURT: Yes, sir. Mr. Lucey?

4 MR. LUCEY: As far as less work for Your Honor, I
5 was just -- the reason we made this motion, Your Honor, is we
6 understood you get an additional MDL clerk if they are filed
7 here or something like that, so...

8 Anyway, Your Honor --

9 THE COURT: So now y'all are even. That depends on
10 how many cases we get, all right?

11 MR. LUCEY: How many does it take?

12 THE COURT: I don't know.

13 MR. LUCEY: Unless Mr. Bryson has something else,
14 the only other thing I was going to address was the six weeks
15 for our next status conference would be about the time we
16 have the motions to dismiss. And I would suggest that they
17 have -- even if it's brief because the motions having been
18 decided, that we have it while we are all on for that.

19 THE COURT: Why don't we set the next meeting for
20 the week of the 4th of September. I'll clear that week for
21 everything and I'll have an MDL week, all right? Anything
22 else?

23 MR. HAHN: Judge, I was remiss earlier, this is
24 administrative, Mr. Bundy is also working with our group, and
25 he had asked me to give his apologies to the Court, he was

1 unable to be here today.

2 THE COURT: Well, tell him we missed him. All
3 right.

4 Anything else from anybody else?

5 MR. OUZTS: Your Honor, one thing, the
6 third-party -- the severed third-party complaint in the
7 Johnson case, I notice that counsel for the third-party
8 defendants are here and wanted to address that, so that's the
9 only other thing that we have.

10 THE COURT: Okay.

11 MR. OUZTS: In light of the Lakes of Summerville
12 case, one of the third-party defendants has now sued MI
13 Windows in a class action case, and we believe that that case
14 should be consolidated with the third-party -- with the
15 separate third-party claim, and also Johnson. And those are
16 issues that will be addressed in briefing in connection with
17 either this case or the Johnson case or Lakes of Summerville.
18 So I don't know that we are prepared today to decide what to
19 do with that third-party, severed third-party action, but I
20 wanted to bring it to the attention of the Court.

21 THE COURT: Yes, sir?

22 MR. DAIGLE: Jason Daigle for the Lakes of
23 Summerville and Sunburst Properties LLC. We are the
24 third-party defendants in MI windows in the Johnson case.

25 Your Honor, we were going to get with each other and

1 figure out sometime in July to address how the third-party
2 issues are going to proceed. That was before Mr. Hahn filed
3 his class action on behalf of the third-parties. So I'm sort
4 of at a loss, I'm not sure exactly what to do with it at this
5 point.

6 MR. HAHN: If I may, Your Honor? As a class
7 action, it moves forward independent of who the named
8 plaintiff is. We can substitute named plaintiffs, and there
9 is plenty of law on those issues. We did not file a class
10 action on behalf of Lakes of Summerville, we filed a class
11 action, and they are the representative party and I think
12 that's the difference. So we don't belong within the Johnson
13 action, which is why -- we are happy to brief that issue if
14 necessary, and I'm happy to talk with all interested parties
15 to set the briefing schedule.

16 THE COURT: Why don't you and Mr. Daigle and
17 Mr. Ouzts while you are here talk about it and see which way
18 you want to go and --

19 MR. HAHN: Be happy to, Judge.

20 MR. DAIGLE: Your Honor, you have already ruled to
21 sever those third-party actions.

22 THE COURT: Right.

23 MR. DAIGLE: I'm not sure how it is going to work
24 with the other class action.

25 THE COURT: Okay. Well, it's been severed and so

1 it's going to remain severed until it gets stitched back
2 together perhaps, okay? So go ahead and talk to Mr. Hahn,
3 Mr. Ouzts, and then we'll just have a hearing in the
4 third-party action in the Johnson case, which has been
5 severed, and everybody else is welcome to come, but it's not
6 necessary for them to come, okay? So we'll do that. And if
7 you need a time, just call my office and we'll set up a time
8 to have a meeting or sit down and talk about it or whatever
9 you want to do, okay? Okay. Thank you.

10 MR. LUCEY: Will the Court be editing CMO number 1,
11 or should I e-mail the CC with that one sentence deleted?

12 THE COURT: Since my judicial assistant is not here
13 and I have limited computer skills, I think probably if you
14 could just go ahead and do the editing and run it by Mr.
15 Farrier and Mr. Hahn, and make sure -- and your crowd, and
16 then we'll -- and just submit it and I'll sign it. How does
17 that sound?

18 MR. LUCEY: Thank you.

19 THE COURT: All right. Thank y'all very much.

20 *****

1
2 I certify that the foregoing is a correct transcript from the
3 record of proceedings in the above-titled matter.
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9 Amy C. Diaz, RPR, CRR

April 21, 2011

10 S/ Amy Diaz
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